Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPLICATION NO B–01–70 OF 2004

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND NIK HASHIM JJCA

23 NOVEMBER 2004

Civil Procedure — Appeal — Appeal to Court of Appeal — Whether court could treat application for stay or for leave to appeal as appeal proper and proceed without written judgment from High Court

Civil Procedure — Government proceedings — Injunction — Jurisdiction to grant permanent and interim injunction against government — Whether bar against grant of permanent and interim injunction against government — Government Proceedings Act 1956 s 29

Civil Procedure — Injunction — Injunction restraining government — Whether bar against grant of permanent and interim injunction against government — Government Proceedings Act 1956 s 29

Contract — Breach — Remedies — Monetary compensation was adequate remedy — Whether court should grant specific relief

Trusts and Trustees — Constructive trust — Breach of contract — Whether constructive trust proved

The appellant, a private limited company, carried on the business of a canteen operator at the first respondent's government hospital. The appellant's case was that in reliance of the assurance of the first respondent, the appellant borrowed money and incurred expenses for the canteen but the first respondent had instead resiled from its assurance by terminating the appellant's contract. The first respondent subsequently granted the contract for operating the canteen to the fourth respondent. The appellant complained that the first respondent acted in breach of contract and constructive trust. The appellant's application for urgent injunction against the first and fourth respondents from evicting it from the canteen premises of the first respondent was dismissed by the judicial commissioner solely on the ground that the court had no jurisdiction to grant the injunction. There were two issues before the court: (1) whether, in view of the provisions of s 29 of the Government Proceedings Act 1956, the High Court had jurisdiction to grant the injunction sought; and (2) whether the facts entitled the appellant to an injunction in the exercise of the court's discretion.

Held, dismissing the appeal:

(1) The court has jurisdiction to treat an application for a stay or for leave to appeal as the appeal proper and proceed without a written judgment from the High Court in the interests of justice (see para 1).

(2) Section 29 of the Government Proceedings Act 1956 is not an impediment to restraining a private defendant from entering into a transaction with the Government. So, in the present case, there was no reason why the fourth respondent could not have been restrained from entering into a contract with the Government to run a canteen at the first respondent hospital. It followed that the learned judicial commissioner fell into error when she held against the appellant on this part of the case (see para 9); *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 followed.

(3) The courts have jurisdiction to grant interim and permanent injunctions against any servant of the Government. Accordingly, there was no jurisdictional bar to the High Court granting the instant appellant the injunction it sought against the first respondent, the director of the hospital. Since a Government servant or a member of the Cabinet may be restrained by injunction, it is strictly unnecessary from a practical point of view to decide whether the Government itself may be restrained in appropriate circumstances (see para 22). It has been settled that s 29 of the Act does not prohibit the grant of temporary injunctions against the Government. Accordingly, it is too late in the day to argue that s 29 bars the grant of an interlocutory or even an interim injunction against the Government (see para 23); *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 and *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 followed.

(4) The appellant had no interest whatsoever in the immovable property in which the canteen was situated. All that the appellant had was a purely contractual right to run the canteen at the respondents' premises: nothing more. And if the appellant established a breach of contract at the trial of the action then he would be entitled to an award of damages in the ordinary way. So, all that the appellant complained about was readily compensated by a monetary award. Since monetary compensation was an adequate remedy, it followed that in accordance with well settled principles governing equitable discretion, specific relief was inappropriate in the circumstances of this case (see para 26).

Per curiam:

It is for the High Court to abide by the Court of Appeal's judgments and those of the Federal Court and not to set these aside as if they were some sort of casual, friendly or social advice that may or may not be followed (see para 27).

[**Bahasa Malaysia summary**

Perayu, sebuah syarikat sendirian berhad, menjalankan perniagaan sebagai operator kantin di hospital kerajaan responden pertama. Kes perayu adalah

berdasarkan kepercayaannya yang bergantung kepada jaminan responden pertama, perayu telah meminjam wang dan menanggung perbelanjaan untuk kantin tersebut tetapi responden pertama sebaliknya telah tidak menepati jaminannya dengan menamatkan kontrak perayu. Responden pertama kemudiannya telah memberikan operasi pengendalian kantin tersebut kepada responden keempat. Perayu mengadu bahawa responden pertama telah bertindak melanggar kontrak dan amanah konstruktif. Permohonan perayu untuk injunksi segera terhadap responden-responden pertama dan keempat daripada menghalaunya dari permis kantin responden pertama ditolak oleh pesuruhjaya kehakiman semata-mata atas alasan bahawa mahkamah tiada bidang kuasa untuk membenarkan injunksi tersebut. Terdapat dua persoalan di hadapan mahkamah: (1) sama ada, menurut s 29 Akta Prosiding Mahkamah 1956, Mahkamah Tinggi mempunyai bidang kuasa untuk membenarkan injunksi yang dipohon; dan (2) sama ada fakta-fakta melayakkan perayu memperoleh satu injunksi dengan menggunakan budi bicara mahkamah.

Diputuskan, menolak rayuan tersebut:

(1) Mahkamah mempunyai bidang kuasa untuk menganggap suatu permohonan untuk penggantungan atau kebenaran untuk merayu sebagai satu rayuan yang betul dan boleh diteruskan tanpa penghakiman bertulis daripada Mahkamah Tinggi demi kepentingan menegakkan keadilan (lihat perenggan 1).

(2) Seksyen 29 Akta Prosiding Mahkamah 1956 bukan 'impediment' untuk permohonan menghalang defendan persendirian dari memasuki transaksi dengan Kerajaan. Oleh itu, dalam kes semasa, tiada alasan kenapa responden keempat tidak boleh dihalang daripada memasuki satu kontrak dengan Kerajaan untuk mengendalikan sebuah kantin di hospital responden pertama. Justeru itu pesuruhjaya kehakiman terkhilaf apabila beliau membuat keputusan tidak menyebelahi perayu dalam kes ini (lihat perenggan 9); *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 diikut.

(3) Mahkamah mempunyai bidang kuasa untuk membenarkan injunksi sementara atau tetap terhadap mana-mana pekerja Kerajaan. Sewajarnya, tiada sekatan bidang kuasa untuk Mahkamah Tinggi membenarkan perayu dalam kes ini injunksi yang dipohon terhadap responden pertama, Pengarah hospital tersebut. Memandangkan pekerja Kerajaan atau ahli Kabinet boleh dihalang oleh injunksi, dari segi pandangan secara praktiknya sememangnya tidak perlu untuk membuat keputusan sama ada Kerajaan sendiri boleh dihalang dalam keadaan tertentu (lihat perenggan 22). Adalah suatu yang telah ditetapkan bahawa s 29 Akta tersebut tidak menghalang pemberian injunksi sementara terhadap Kerajaan. Justeru itu, agak terlambat untuk berhujah yang s 29 menghalang pemberian injunksi interlokutori ataupun sementara terhadap Kerajaan (lihat perenggan 23); *Tengku Haji Jaafar & Anor v Government of the State*

of Pahang [1978] 2 MLJ 105 dan *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 diikut.

(4) Perayu tiada kepentingan langsung ke atas hartanah di mana terletaknya kantin tersebut. Perayu hanya mempunyai hak kontraktual semata-mata untuk mengendalikan kantin tersebut atas premis responden: tidak lebih daripada itu. Dan jika perayu membuktikan perlanggaran kontrak semasa perbicaraan tindakan tersebut maka beliau berhak mendapat award ganti rugi seperti biasanya. Oleh itu, apa yang diadukan oleh perayu boleh diberi pampasan melalui award berbentuk wang. Memandangkan pampasan berbentuk wang merupakan remedi yang memadai, dengan itu menurut prinsip-prinsip tetap yang mengawal budi bicara yang saksama, relief spesifik tidak sesuai dalam keadaan kes ini (lihat perenggan 26).

Per curiam:

Adalah tugas Mahkamah Tinggi untuk mematuhi penghakiman Mahkamah Rayuan dan Mahkamah Persekutuan dan tidak mengenepikannya secara lewa, seperti satu nasihat yang boleh atau tidak perlu diikut (lihat perenggan 27).]

Notes

For cases on appeal to Court of Appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 598.

For cases on constructive trust generally, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1993–2018.

For cases on injunction in government proceedings, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1911–1912.

For cases on remedies, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2352.

For injunctions, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.5-001]–[10.5-35].

Cases referred to

Birmingham Midshire Mortgage Services v Sabherwal 80 P & CR 256 (refd)

Gillette v Holt [2000] 2 All ER 289 (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 (folld)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1 (folld)

Lim Kit Siang v United Engineers (M) Bhd & 3 Ors (No 2) [1988] 1 MLJ 50 (refd)

M v Home Office [1994] 1 AC 377 (refd)

Martin-Baker Aircraft Co Ltd & Anor v Canadian Flight Equipment Ltd [1955] 2 QB 556 (refd)

Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd [1998] MLJU 379 (refd)

Merricks v Heathcoat-Amory [1955] Ch 567 (refd)

Muniandy a/l Subramaniam & Ors v Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor [2003] 6 MLJ 177 (refd)
Nireaha Tamaki v Baker [1901] AC 561 (refd)
Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor [2003] 3 MLJ 522 (refd)
Rankin v Huskisson (1830) 58 ER 6 (refd)
Saonah bte Bedul v Pentadbir Tanah dan Daerah Melaka Tengah [1994] 3 MLJ 758 (refd)
Smith v Attorney General of Nova Scotia [2004] NSCA 106 (refd)
Syarikat Bunga Raya Timor Jauh Sdn Bhd & Anor v Tractors Malaysia Bhd [1980] 2 MLJ 127 (refd)
Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 (refd)
Tengku Haji Jaafar & Anor v Government of the State of Pahang [1978] 2 MLJ 105 (folld)
Yaxley v Gotts [2000] 1 All ER 711 (refd)

Legislation referred to

Crown Proceedings Act 1948 [UK] s 21
Government Proceedings Act 1956 s 29
Proceedings against the Crown Act 1989 [Can] s 16(2), (4)
Rules of the Court of Appeal 1994
Rules of the High Court 1980 O 53
Specific Relief Act 1950 ss 50, 51, 54(d)

Appeal from: Civil Suit No 21–108 of 2004 (High Court, Shah Alam)

V Sithambaram (N Rajivan with him) (Sitham & Assoc) for the appellant.
Alice Loke Yee Ching (Siti Nur Ikhlas Bustami with her) (Attorney General's Chambers) for the first, second and third respondents.
Kamalniza Alias (Yazid, Baba & Partners) for the fourth respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] On Wednesday, 6 October the appellant (plaintiff in the court below) moved this court for an urgent injunction against the first and fourth respondents from evicting it from the canteen premises of the first respondent. An injunction in similar terms had been applied for in the court below and had been refused by the judicial commissioner solely on the ground that she had no jurisdiction to grant the injunction. After reading the papers we formed the view that it was in the interests of justice to treat the motion before us as the appeal and we so ordered. We did not have the benefit of a judgment from the learned judicial commissioner. But that did not inconvenience us because the point on which she decided the case is one of pure law. In any event we have jurisdiction to treat an application for a stay or for leave to appeal as the appeal proper and proceed without a written judgment from the High Court in the interests of justice: *Syarikat Bunga Raya Timor Jauh Sdn Bhd*

& Anor v Tractors Malaysia Bhd [1980] 2 MLJ 127; *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor* [2003] 3 MLJ 522. The appeal was then fixed for hearing in the list of appeals for the week commencing 11 October 2004. To facilitate the speedy disposal of the appeal we granted the appellant dispensation from complying with the Rules of the Court of Appeal 1994 and directed that it merely file its memorandum of appeal without the accompanying documents. The appeal was heard on 13 October 2004. At the conclusion of arguments for the appellant we found it unnecessary to call upon the respondents for a reply and therefore dismissed the appeal. The reasons for our conclusion are now produced.

[2] The brief facts of this case are as follows. The appellant, a private limited company, carries on the business of a canteen operator. According to the evidence, the appellant operates canteens at several government hospitals. Among these is the first respondent. It is not disputed that the appellant was awarded a two year contract from 11 September 2001 to 10 September 2003 to operate the canteen at the first respondent's premises. The contract in question was never formalised. It was merely evidenced in writing. It had no provision for termination. It was therefore determinable by the giving of reasonable notice. See, *Martin-Baker Aircraft Co Ltd & Anor v Canadian Flight Equipment Ltd* [1955] 2 QB 556; *Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd* [1998] MLJU 379.

[3] On 9 July 2003, the first respondent's canteen committee met and decided that the appellant's contract would be extended for a further six months subject to a review for a further extension provided that the appellant overcame the complaints that had been received about the quality of its service. By a letter dated 11 September 2003, the first respondent informed the appellant confirming the extension of six months and of the need for the appellant to pull up its socks. The letter also said that the appellant would be granted a further contract of two years to operate the canteen if the respondent is satisfied with the appellant's service. At a meeting of the first respondent's canteen committee on 2 December 2003 attended by the appellant's representatives, it was accepted by the director of the first respondent that the appellant's service had improved and that it had overcome all the complaints levelled against it. The appellant's representatives were assured that the appellant would be awarded a further two year contract. The appellant's case is that in reliance of this assurance of the first respondent the appellant borrowed money which it invested in installing new equipment, refurbishing the premises and hiring additional manpower but that the first respondent had resiled from its assurance by terminating the appellant's contract by its letter of 10 May 2004. The appellant also complains that the first respondent acted in breach of contract by awarding the canteen contract to the fourth respondent.

[4] On the foregoing facts two issues present themselves for resolution. First, whether the High Court had jurisdiction to grant the injunction sought.

Second, whether the facts entitled the appellant to an injunction in the exercise of the court's discretion. We will deal with each of these in turn.

[5] First, the jurisdictional point. The relevant provision is s 29 of the Government Proceedings Act 1956 ('the 1956 Act') the relevant part of which reads:

> (1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that:
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> (a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties.
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

[6] Proviso (a) to the section has been considered in a number of cases. Some judges have interpreted the proviso to impose a complete bar to the grant of any form of injunction, whether temporary or permanent against the Federal or any State Government or its officers, including Ministers. Others have taken the view that the section only bars the grant of a permanent injunction against the Government. Principal among the cases where the former view was expressed is *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 where Salleh Abas LP took the extreme view that even indirect restraints against the Government were barred by proviso (a). After setting out the s 29 he said:

> This means that no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of restraining the Government or its officers from performing their functions. This has been the interpretation which has been placed by the courts in England as well as in this country.

[7] Abdul Hamid CJ (Malaya) did not go as far. He held that s 29 affords a defence to the government or a servant of the government to a claim for an injunction subject to compliance with the requirements therein stated. The other member of the majority was Hashim Yeop A Sani SCJ who did not deal with s 29 at all. Both dissenting judges (Seah and Abdoolcader SCJJ) however held that s 29 did not bar the grant of interim injunctions against the Government or its officers.

[8] Further, a differently constituted bench of the Supreme Court (Lee Hun Hoe CJ (Borneo), Wan Suleiman and Wan Hamzah SCJJ) in the same case reversed the decision of the High Court at Penang refusing an interim injunction against *United Engineers*. The oral judgment of a unanimous Supreme Court was reproduced by VC George J (as he then was) in his judgment in *Lim Kit Siang v United Engineers (M) Bhd & 3 Ors (No 2)* [1988] 1 MLJ 50 as is as follows:

> The learned judge's interpretation of s 29 of the Government Proceedings Ordinance is too wide. Apart from what the statute expressly prohibits, he ruled that the court cannot grant an injunction against a party having a transaction with the Government as in the present case. That will have the effect, he said, of indirectly prohibiting the Government from signing the agreement. *With respect we are unable to agree with the learned judge's extension of the scope of that section.*
>
> We have considered a number of authorities both English and local as to the question of *locus standi*. We need only say that on the facts of this case the appellant clearly has *locus standi* to bring this suit.
>
> For the purpose of the application we do not consider the question of the lawfulness or otherwise of the contract is relevant at this stage. We therefore allow the appeal. Costs in the cause.
>
> We would grant the Order in terms of prayers (1) and (2) of the said Summons-in-Chambers with liberty to apply to the court below.
>
> We would order that this suit be heard early before another judge. (Emphasis added.)

[9] It is therefore plain that six out of seven judges of the Supreme Court — in the same case — were unanimous that s 29 does not prevent an injunction being granted against a private defendant from entering into a transaction with the Government. We say 'six out of seven judges' because Abdul Hamid CJ (Malaya) appears to accept that the interpretation of s 29 by the earlier bench (Lee Hun Hoe CJ (Borneo), Wan Suleiman and Wan Hamzah SCJJ) precluded any further agitation of the point although his own view accorded with that of the Penang High Court. Thus, when *all* the judgments delivered by their lordships of the Supreme Court in *Government of Malaysia v Lim Kit Siang* are interpreted, it is clear that that case is authority for the proposition that s 29 is not an impediment to restraining a private defendant from entering into a transaction with the Government. So, in the present case, there was no reason why the fourth respondent could not have been restrained from entering into a contract with the Government to run a canteen at the first respondent hospital. It follows that the learned judicial commissioner fell into error when she held against the appellant on this part of the case.

[10] We now turn to the wider question, namely whether there is jurisdiction in a court to grant an injunction against the Government or its officers. Let us take officers of the Government first.

[11] Since s 29 finds its origins in s 21 of the United Kingdom Crown Proceedings Act 1948, the starting point is the position as it stood before 1947. That position is as follows. At common law, a subject could not sue the Crown or its officers. This was based on the feudal maxim 'the King can do no wrong'. On that basis even prerogative writs could not be issued against the Crown. The only way in which a subject could seek recourse against the Crown or its officers at common law was by a petition of right that was granted at the unfettered discretion of the Sovereign.

[12] By contrast, courts of equity always — even before 1947 — exercised jurisdiction to grant injunctions against Ministers and officials empowered in their own names. See *Rankin v Huskisson* (1830) 58 ER 6; *Nireaha Tamaki v Baker* [1901] AC 561. In the last mentioned case, the Judicial Committee of the Privy Council issued an interim injunction against an officer of the Crown, namely, the Commissioner of Crown Lands restraining him from selling land claimed to be subject to Maori native title pending adjudication of the claim. Lord Davey said:

> Their Lordships think that the learned judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown, or acting under the authority of the Crown for the purpose of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority, the conditions of which, it is alleged, have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes, and is confined within the four corners of the statutes. The Governor, in notifying that the lands were rural land open for sale, was acting, and stated himself to be acting, in pursuance of the 136th section of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of s 137 of the same Act. If the land were not within the powers of those sections, as is alleged by the appellant, the respondent had no power to sell the lands, and his threat to do so was an unauthorized invasion of the appellant's alleged rights.

[13] The effect of this passage is that an aggrieved person may sue an officer of the Crown to restrain a threatened act purportedly done pursuant to a statute.

[14] We now turn to consider the position after 1948. It is axiomatic that the Crown Proceedings Act 1948 was passed to improve the position of the citizen vis-a-vis his or her rights against the Crown. As Professor Wade in his article '*Injunctive Relief against the Crown and Ministers*' (1991) 107 Lq R 4 at 6 says:

> The Crown Proceedings Act 1948 was a remedial statute, designed to put the Crown, so far as it could properly be done, into the position of an ordinary litigant, so that justice could be done without obstruction by the Crown's ancient immunities. AsLord Jauncey said in *British Medical Association v Greater Glasgow Health Board* [1989] AC 1211 (where, incidentally, Lord Diplock's *Town Investments* [*Town Investments Ltd v*

Department of the Environment [1978] AC 359] dicta were once again disregarded), 'the general purpose of the Crown Proceedings Act was to make it easier rather than more difficult for a subject to sue the Crown,' and the extension of immunities would 'run wholly counter to its spirit'.

[15] Despite the fact that the 1947 Act was remedial in nature, it received a restrictive interpretation in *Merricks v Heathcoat-Amory* [1955] Ch 567. In that case Upjohn J held that s 21 of the United Kingdom Act absolutely prohibited a court from granting an injunction against a Minister who was acting in his capacity as an officer representing the Crown. The facts of that case were as follows.

[16] The plaintiff sought a mandatory injunction against the Minister of Agriculture, Fisheries and Food requiring him to withdraw the draft of a statutory scheme regulating the marketing of potatoes which had been laid by him before Parliament. The action was brought against the defendant both in his personal capacity and in his capacity as minister, a corporation sole constituted by statute. The most important feature of *Merricks v Heathcoat-Amory* is that it was a private law action. Accordingly, the plaintiff there was not entitled to seek any relief, including injunctive relief unless he could show that he was seeking to enforce some legal or equitable right to which he was entitled. Therefore he lacked locus standi to bring the action. What in fact Upjohn J, held was that the minister 'from start to finish . . . was acting in his capacity as an officer representing the Crown'. He then went on to decide the case on the erroneous concession of counsel that no injunction could be obtained against the Minister in his official capacity. It was on the basis of this erroneous concession that the application for an injunction was dismissed in limine. We say that the concession of counsel in that case was erroneous on the authority of such cases as *Rankin v Huskisson* and *Tamaki v Baker*.

[17] Despite its indefensibility in the light of the decision in *Tamaki v Baker* the narrow view taken in *Merricks v Heathcoat-Amory* held the field until 1994. However, the House of Lords in *M v Home Office* [1994] 1 AC 377 departed from *Merricks v Heathcoat-Amory* and held — and here we quote from the headnote of the case — that:

> Injunctions, including interlocutory injunctions, could be granted and that s 21 of the Act of 1947 did not prevent an injunction being granted in a situation in which it could have been granted prior to the Act.

[18] It is clear from the speeches in *M v Home Office* that if the facts of *Merricks v Heathcoat-Amory* were to recur today, an injunction would be available against the defendant Minister of the Agriculture provided that it was brought as a public law action. We may also mention in passing that in *Government of Malaysia v Lim Kit Siang* the action failed because the majority of the Supreme Court classified it as a private law action because of the limited range of remedies available under RHC O 53 as it then stood. If such a plaintiff as in

A that case were to bring a similar action today, we have no doubt that he would be accorded locus standi in view of O 53 as it presently stands.

[19] In Canada, s 16(2) and (4) of the Proceedings against the Crown Act 1989, is in pari materia with proviso (a) to our s 29(1) and s 29(2) respectively. They provides as follows:

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> (2) Where, in proceedings against the Crown, any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but may, in lieu thereof, make an order declaratory of the rights of the parties.

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> (4) The court shall not in any proceedings grant an injunction or make an order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in proceedings against the Crown, but may, in lieu thereof, make an order declaratory of the rights of the parties.

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[20] The Court of Appeal of Nova Scotia in *Smith v Attorney General of Nova Scotia* [2004] NSCA 106 considered the effect of these provisions and held that s 16(4) of the Canadian statute (s 29(2) of the 1956 Act) did not prevent interim injunctions being granted against officers of the Crown. Cromwell JA (Freeman and Roscoe JJA concurring) in a judgment delivered on 15 September 2004, said:

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> I conclude that the ordinary sense of the words of s 16(4), read in the context of the preexisting law and the scheme and purpose of the Act leads to two conclusions: first, that in drafting the section, the Legislature assumed that injunctions against Crown officers were available in some circumstances; and, second, that the intention was not to prohibit such injunctions in all circumstances …

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[21] In a later passage the learned judge said that in his opinion:

> the better view is that provisions such as s 16(4) are declaratory of the common law and, therefore, did not introduce any new restrictions on the availability of injunctions against Crown servants. I say this for two reasons. First, it seems to me to be the better interpretation of the statute read in its full context. Second, this view has the recent support of the House of Lords (effectively overruling much of the earlier English authority to the contrary to which I have referred to in the preceding paragraph), the more recent scholarly writing, and the weight of the admittedly scant Canadian judicial authority: see for example *Re M* [1994] 1 AC 377 (HL (E)).

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[22] Our attention was also drawn by learned counsel for the appellant to *Saonah bte Bedul v Pentadbir Tanah dan Daerah Melaka Tengah* [1994] 3 MLJ 758 where Mohd Noor J held (obiter) that an interim injunction could be issued against the defendant Land Administrator in that case or an officer of the Government by reason of s 29(2) of the Government Proceedings Act 1956 read together with ss 50, 51 and 54(d) of the Specific Relief Act 1950. We entirely

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agree with and endorse the views of the learned judge in that case. In our judgment, the effect of current authority is that our courts have jurisdiction to grant interim and permanent injunctions against any servant of the Government. Accordingly, there was no jurisdictional bar to the High Court granting the instant appellant the injunction it sought against the first respondent, the Director of the hospital in question. Since a Government servant or a member of the Cabinet may be restrained by injunction, it is strictly unnecessary from a practical point of view to decide whether the Government itself may be restrained in appropriate circumstances. Nevertheless, since the question is one which was argued before and ruled upon by the learned judicial commissioner, we think it behoves us to deal with the point. We accordingly proceed to consider the position of the second and third respondents, namely, the Ministry of Health and the Government of Malaysia.

[23] It has been settled since at least 1978 that s 29 of the 1956 Act does not prohibit the grant of temporary injunctions against the Government. In *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 it was held that the section 'does not take away therefore the right of the court to grant an interlocutory injunction'. This court in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 treated the ratio in *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 as settled law. Although the Federal Court reversed our decision in that case on the constitutional point, our judgment on this point was approved *sub silentio.* Accordingly, it is too late in the day to argue that s 29 bars the grant of an interlocutory or even an interim injunction against the Government.

[24] That brings us to the second issue, namely, whether an injunction should be granted on the merits of the case before us. Of course, the usual practice of this court once we find that the court below has wrongly rejected an application on jurisdictional grounds is to remit the case to the judge to decide the case on merits. But this is not an ordinary case. Here all the material relevant to the exercise of discretion was before us and the matter is, as we have already said, is one of urgency. We therefore considered this to be an appropriate case for us to decide whether the merits justify the grant of the injunction sought. In our view they do not.

[25] This is a case of a pure breach of contract. Learned counsel for the appellant cited a number of recent cases where equitable estoppel has been elevated to the status of a constructive trust because of some unconscionable behaviour on the part of the representee. The cases include *Yaxley v Gotts* [2000] 1 All ER 711, *Gillette v Holt* [2000] 2 All ER 289. We may add that useful reference may also be made to *Birmingham Midshire Mortgage Services v Sabberwal* 80 P & CR 256 where Robert Walker LJ (now Lord Walker) said that in certain situations, for example, a family arrangement, 'the concepts of trust and equitable estoppel are almost interchangeable'. Relying on this line of authority counsel argues that there subsists a constructive trust in his client's favour because:

(i)the respondents made a representation that the canteen contract would be renewed; (ii) the appellant, encouraged by the representation and acting upon it, expended money in refurbishing the premises in question, employing additional staff and purchasing new equipment; (iii) the conduct of the respondents in reneging on their promise and awarding the canteen contract to the fourth respondent is unconscionable.

[26] Now, if you look at the cases relied on by counsel, you will find that the court in each case imposed a constructive trust to protect a litigant's interest in immovable property. Here, the appellant has no interest whatsoever in the immovable property in which the canteen is situated. All that the appellant has is a purely contractual right to run the canteen at the respondents' premises: nothing more. And if the appellant establishes a breach of contract at the trial of the action then he will be entitled to an award of damages in the ordinary way. So, all that the appellant complains about is readily compensated by a monetary award. Since monetary compensation is an adequate remedy, it follows that in accordance with well settled principles governing equitable discretion, specific relief is inappropriate in the circumstances of this case.

[27] Before we conclude there is one matter requiring comment. When writing this judgment, we came across the case of *Muniandy a/l Subramaniam & Ors v Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor* [2003] 6 MLJ 177 where the High Court purported to follow Salleh Abas LP's view in *Government of Malaysia v Lim Kit Siang* while rejecting the judgment of so distinguished a judge as Edgar Joseph Jr J in *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 affirmed by this court in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 which is a decision the High Court also refused to abide by. We may say at once that the High Court's purported acceptance of Salleh Abas LP's view in *Government of Malaysia v Lim Kit Siang* was done without any proper appreciation or evaluation of the jurisprudential worth of that view. With great respect to the learned judicial commissioner in *Muniandy v Majlis Perbandaran Langkawi*, it was not open to him to refuse to follow a decision of this court. We reiterate that it is for the High Court to abide by our judgments and those of the Federal Court and not to set these aside as if they were some sort of casual, friendly or social advice that may or may not be followed. And we trust that no further reminder of this nature will be necessary in future.

[28] For the reasons already given, the appeal was dismissed and those orders made that are usually consequent upon a dismissal.

Appeal dismissed with costs.

Reported by Loo Lai Mee